UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18 (WELDED CONSTRUCTION, L.P.)

and Case 08–CB–138850

GARY LANOUX, an Individual

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18 (PETE GOULD & SONS, INC.)

and Case 08–CB–138909

GARY LANOUX, an Individual

Melanie Bordelois, Esq.,
for the General Counsel.
Timothy Fadel and William Fadel, Esqs.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cleveland, Ohio, on September 15-16, 2015. Gary Lanoux (Lanoux), filed the charge in Case 08-CB-138850 on October 16, 2014, and an amended charge on December 23, 2014. [1] Lanoux filed the charge in Case 08-CB-138909 on October 16, and an amended charge on December 23, 2014. On April 29, 2015, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing and on September 14, 2015, the General Counsel issued an amended consolidated complaint and notice of hearing (the complaint). The Respondent filed an answer denying the substantive allegations of the complaint.

[1] All dates are in 2014 unless otherwise indicated.

The complaint alleges that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) when it failed to provide Lanoux the following requested information, for the period of July 1 through 31, 2014, regarding an employee (Richard Groesser) who was employed by Welded Construction, L.P. (Welded): certified payroll documents; signed dues-checkoff card; steward's report; business agent's report, date of urinalysis test; and verification of Welded's contribution to the Respondent's health & welfare, pension, apprenticeship, safety & education, pipeline training, LMCT, and EPEC Funds.

The complaint further alleges that the Respondent violated Section 8(b)(1)(A) of the Act by failing to provide Lanoux with the following information he requested on August 11, 2014: the names, dates of employment and position of the "key men" hired by Pete Gould & Sons, Inc. (Pete Gould) and any requests Pete Gould made to the Respondent for the referral of specific operators.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and Welded, I make the following

FINDINGS OF FACT

I. JURISDICTION

Welded Construction, L. P. (Welded) is a Delaware limited partnership, with an office and place of business in Perrysburg, Ohio, and is engaged in the business of gas and oil pipeline construction and maintenance. Annually, in conducting its operations, Welded purchases and receives at its Perrysburg, Ohio facility goods valued in excess of $50,000 directly from points outside the State of Ohio.

Pete Gould and Sons, Inc. (Pete Gould), a West Virginia corporation, with an office and place of business in Ravenswood, West Virginia, is engaged in the business of oil and gas pipeline installation. Annually, in conducting its operations, Pete Gould purchases and receives at its Ravenswood, West Virginia facility goods valued in excess of $50,000 directly from points outside the State of West Virginia.

The Respondent admits, and I find, that Welded and Pete Gould are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

Background

The Respondent is affiliated with the International Union of Operating Engineers (IUOE or International). The Respondent's jurisdiction includes 85 of the 88 counties in Ohio

(excluding Columbiana, Mahoning and Trumbull Counties), and also includes 4 counties in the State of Kentucky.

For a substantial number of years the Respondent has operated an exclusive hiring hall pursuant to provisions contained in article III of the Ohio Highway Heavy Agreement (HHA) that it has maintained with the Labor Relations Division of the Ohio Contractors Association. The most recent HHA is effective by its terms from May 8, 2013, through April 30, 2017 (GC Exh. 3).

Pursuant to the hiring hall provisions, there are three different methods that employers hire employees through the Respondent's exclusive hiring hall. Under the "straight dispatch" method, an operating engineer registers as an applicant for employment in any of the Respondent's five district offices located throughout Ohio. The applicant completes a registration card which indicates the type of equipment the applicant is capable of operating and any certifications he or she possesses. The registration card is time and date stamped and placed in the "referral deck." An employer places a work order which identifies the job location and the type of equipment to be operated with the Respondent's dispatcher at the applicable district office. The dispatcher then reviews the cards in the referral deck and refers the qualified applicant who has been out of work the longest period. The Respondent maintains the following records regarding the referral: the name of the employer; the time and date of the request; the type of equipment to be operated; the location of the job; the name of the applicant referred to the job, and the timestamp on the registration card of the referred applicant.

An employer may also send a "letter of request" to the appropriate district office of the Respondent seeking the referral of a specific employee. Such requests are honored by the Respondent provided that the employee sought by the employer has been registered in the hiring hall for at least 10 days and is in the referral deck.

The third method of hiring under the hiring hall provisions of the HHA is a "direct recall." Under this method an employer may directly recall a specific operating engineer that has worked for the employer at some time in the past 24 months.

The Respondent posts all the dispatches that are made during the week from each of its five district offices on a bulletin board at the district office from which the referral was made. The information posted on the bulletin board includes straight dispatches, applicants who were requested pursuant to a letter of request,[2] and applicants who were recalled by an employer. The referral sheet posted by the Respondent also includes the identity of the hiring hall applicant receiving the referral, the contractor the applicant was referred to, the date the applicant registered in the hiring hall, the date the job request was received, the date the applicant was required to start working, the type of equipment that the operator would be using, and whether any special skills were requested by the employer. The referral sheets remain posted for 2 weeks and any hiring hall applicant for employment can review them. Upon request, an applicant at the hiring hall can also review registration cards, work orders, and older referral sheets.

[2] If an applicant was referred pursuant to a letter of request, a box is checked on the posted referral information reflecting that fact.

The IUOE and the Pipe Line Contractors Association (PLCA) negotiate a National Pipeline Agreement (NPA) which is applicable to "mainline pipeline installation and construction" projects nationwide. The most recent NPA is effective by its terms from February 1, 2014, through June 4, 2017 (GC Exh. 4). A substantial amount of the equipment utilized in the pipeline construction industry is specialized and requires particular skills. Since the first NPA was negotiated in 1941, signatory employers have retained the right to choose a percentage of their work force independent of referrals from the hiring hall with jurisdiction over the area where a pipeline project is being constructed. In Ohio the percentage of employees that an employer may employ independent of referrals from the hiring hall is 50 percent and is referred to as the "50/50 rule." The remainder of a signatory employer's workforce must be obtained through the IUOE local hiring hall with jurisdiction over the location of the pipeline project. The specific language of the NPA regarding an employer's right to hire employees directly is contained in article II(I) and provides, in relevant part:

> Employer shall have the right to employ and bring into the job Employees who are Regular Employees in Employer's work, and shall have the right to such Employees in his employ on all work throughout the territory covered by a particular job for which the pre-job conference was held. Employers shall have the right to employ up to fifty percent (50%) of the required Employees as Regular Employees.

The NPA defines regular employees as those "who are regularly and customarily employed by the individual Employer, and who, because of their special knowledge and experience in pipeline construction, are considered as 'key men'" (GC Exh. 4, article II(J)). In the industry, the terms "regular employees" and "key men" are used interchangeably.

Lanoux has been a member of the Respondent since 2002 and regularly uses the Respondent's hiring hall to obtain work. Lanoux testified at the hearing that he registers in the hiring hall approximately 5 to 11 times per year and that he has operated various pieces of equipment on both pipeline and other construction projects.

Lanoux's Request for Information Regarding a Key Man at the Welded Project

Welded is a pipeline contractor and is signatory to the NPA. Lanoux worked for Welded on a pipeline project that was performed within the Respondent's jurisdiction in Southeastern Ohio from March 14, 2014, through April 18, 2014, when he was laid off for lack of work (GC Exh. 6). Immediately after his layoff he was referred by the Respondent to another pipeline contractor, Phillips and Jordan, and worked there until approximately June 28, 2014. After Lanoux's layoff at the end of June 2014, he registered in the Respondent's hiring hall.

In June 2014, Welded was preparing to perform a pipeline construction project under the NPA in Noble County, Ohio, which is within the Respondent's jurisdiction. At the end of June 2014, Lanoux went to Welded's warehouse in Caldwell, Ohio, to inquire whether Welded needed operating engineers for the pipeline project it was beginning. He spoke to a supervisor, Kevin Eckleberry, who told him that Welded did not need any operating engineers at that time but that in about 10 days Welded would start hiring operators.

Lanoux credibly testified that he returned to Welded's Caldwell, Ohio warehouse on approximately July 14. At that time he was speaking to some Welded supervisors when he overheard one of the supervisors, Don Krug, introduce a person, Richard Groesser[3] to Randy Totman, the Respondent's job steward, as "his next boom operator." In part of the conversation Lanoux overheard there was a reference to Groesser coming from Michigan. Totman told Groesser that he would register him and Totman and Groesser proceeded to go to the job trailer.

The next day Lanoux went back to the Welded warehouse where Groesser was working in the yard. According to Lanoux, he introduced himself to Groesser and showed him his union card. Groesser said that his card was in his truck and Lanoux indicated that was fine. According to Lanoux, they spoke generally about pipeline work and Groesser mentioned that he had not worked for Welded since 2009.

Lanoux was not hired by Welded for this project and was not referred to this project by the Respondent. On July 30, 2014, Lanoux filed a grievance (GC Exh. 6) claiming that Welded's hiring of Groesser, a member of IUOE Local 324, violated contract provisions. Lanoux claimed that Groesser was not a key employee of Welded and had not worked for Welded since 2009, which did not give him recall rights.[4] Lanoux's grievance alleged "Due to the extent of my pipeline training, I should receive preferential dispatch to pipeline jobs, including over other union members coming in from other IUOE local members because the work in Ohio falls within the jurisdiction of Local 18." Lanoux's grievance claimed, inter alia, pay and fringe benefits from June 18, 2014, through July 28, 2014, for "violating my rights to recall and Local 18 dispatch procedures."

Richard Dalton has been the Respondent's business manager since May 28, 2015. Prior to attaining that position he was the Respondent's president from July 1, 2010 through May 27, 2015. Dalton credibly testified that after receiving Lanoux's July 30, 2014 grievance, he directed Business Agent Darren Morgan to go to the Welded jobsite and investigate the grievance and determine the manner in which Groesser was hired. Dalton specifically directed Morgan to determine whether Groesser obtained employment through the referral process or whether he was a key man, and, if he was a key man, was the company within its rights under the 50/50 rule at the time it hired Groesser. Dalton testified that Morgan reported to him that Groesser was hired as a key man and that at the time that he was hired that the employees referred from the Respondent's hiring hall were two or three employees above 50 percent of the work force and thus Welded was within its rights to hire an employee as a key man.

On August 6, 2014, Dalton sent a letter to Lanoux denying his grievance. (GC Exh. 7) In his letter, Dalton noted that article III, paragraph 21(I) of the "referral" (the HHA) indicates that the employer may request employees by name who have been employed by the requesting employer within the past 24 months. Dalton indicated that while Lanoux was eligible for recall,

[3] Lanoux initially thought this employee's name was Richard Dosier.

[4] At the trial Lanoux testified that the basis for his claim that Groesser had not worked for Welded since 2009 was that Groesser had told him that. Clearly, such evidence is hearsay. I note there is no objective evidence that establishes the frequency with which Groesser had worked for Welded prior to July 2014.

"Welded had no obligation to recall you to the job since the referral makes recall of an employee optional not mandatory."

With respect to Lanoux's claim that the hiring of Groesser violated the NPLA[5] and the HHA, Dalton's letter indicated that article II, paragraph (I) of the NPLA permits signatory employers to employ up to 50 percent of the required employees as regular employees. The letter further indicated that at the time of Groesser's July 28, 2014 hire date less than 50 percent of Welded's operators were "regular employees." Dalton's letter further provided, "Since the "regular" operating engineer complement of employees was less than 50 percent (50%) and Groesser fit the definition of "regular employees" Welded was in full compliance with the NPLA and the referral. Since there is no violation of either agreement your grievance is not well taken and Local 18 will not proceed any further."

On September 3, 2014, Lanoux sent a grievance form to the Respondent attaching a letter dated September 2, 2014. (GC Exh. 8.) In Lanoux's September 2 letter he reiterated his claim that Groesser could not have been a regular employee because he had not been employed by Welded since 2009. Lanoux further claimed that Dalton's statement that Groesser's starting date with Welded was July 28, 2014, was an error. Lanoux claimed that he had established Groesser's hiring date to be July 16, 2014. Lanoux then requested the following documents regarding Groesser for the period from July 1 through 31, 2014, in order "to establish and correct the error in your statement": certified payroll documents; signed dues-checkoff card; steward's report; business agent's report; date of urinalysis for Welded pre-employment test; and verification of Welded's contribution to the health and welfare, pension, apprenticeship, safety and education, pipeline training, LMCT, and EPEC funds.

Lanoux's letter closed with the following, "As you have stated this Grievance is not well taken and Local 18 will not proceed any further. Therefore I as is my right to seek relief from the NLRB and possible civil action."

The Respondent did not respond to Lanoux's September 2, 2014 letter. Dalton testified that he did not feel the need to respond to Lanoux's letter because Lanoux had acknowledged that the Respondent was not going to proceed with the grievance and that Lanoux indicated he was going to go to the NLRB. Dalton further testified that the reference in his letter to Groesser's hiring date as July 28, 2014, was a typographical error and the letter should have indicated that his hire date was July 18, 2014. According to Dalton, this error was not material to his decision regarding the grievance since it had been reported to him that when Groesser was hired the Respondent was below the number of employees it was entitled to have as key men under the 50/50 rule.

Lanoux's Request for Information Regarding Key Men at the Pete Gould Project

In late July 2014, the Respondent referred Lanoux from the hiring hall to operate an excavator for Pete Gould on a pipeline project in Monroe County, Ohio, which is within the Respondent's jurisdiction. Lanoux worked for Pete Gould for 2 days and was informed by his supervisor that his assignment was complete and he was being laid off (GC Exh. 10, p. 18).

[5] Dalton's letter refers to the National Pipeline Agreement as the NPLA.

On July 29, 2014, the Respondent's district office in Akron, Ohio, received a letter from Dennie Shinn, a superintendent for Pete Gould, indicating the following: "We would like to request that Gary Lanoux no longer be dispatched to any jobsite at Pete Gould and Sons due to not being able to perform the job he was called for. He was dispatched to operate a 324 E Excavator in the Tie-Ins. Operator's ability is unsatisfactory and unsafe." (GC Exh. 9.)

On the same date, the Respondent's district representative, Joseph Lucas, forwarded to Lanoux the letter the Respondent had received from Pete Gould. The Respondent's letter indicates, in relevant part, that: " [T]he letter states that you do not have the required skills to operate an excavator on Pipeline Projects. Therefore, excavator will be removed from your registration card. In order for you to put excavator back on your card, you must provide District 6 with letters from three previous Pipeline Contractors stating that you are proficient at operating the machine, or you may go to one of the training centers to be qualified by one of the instructors."

On August 11, 2014, Lanoux filed a five-page grievance with several attached documents with the Respondent. While Lanoux's grievance made several claims against the Respondent and its agents, as the grievance is germane to this case, it contested the removal of excavator from his referral card. In relevant part, Lanoux's grievance sought as a remedy backpay and fringe benefits from July 30, 2014, "to the present" and also sought the following: "Immediately restore Dozer, hoe and/or excavator to my dispatch referral card or in the alternative acknowledge the inadequacy of the training provided by the International and the PETF and also Local 18's pipeline training course."

While Lanoux's grievance makes a reference to the Respondent's failure to comply with the 50/50 rule under the NPA, a fair reading of the grievance, in my view, does not indicate a claim that that his referral rights were violated with respect to his dispatch to the Pete Gould jobsite or that his rights were violated in some manner by the application of the 50/50 rule at this jobsite. Rather, in the paragraph in which he makes reference to the alleged violation of the 50/50 rule, Lanoux only claims that Pete Gould and the Respondent have failed to recognize certain training certifications that he possesses. (GC Exh. 10, August 11, 2014 letter, p. 3.)

In his grievance, Lanoux requested that the Respondent furnish to him a substantial amount of information, including, inter alia, the following: the names, dates of employment, and position of regular employees, and any requests Pete Gould made to the Respondent for the referral of specific operators. Lanoux's grievance, however, does not indicate in any manner why the requested information noted above is necessary and relevant to the grievance he filed.

Dalton testified that after reviewing Lanoux's lengthy grievance, he interpreted it to be a claim that Lanoux was unhappy with his discharge and the fact that the employer had notified the Respondent that he was not capable of running the equipment to its satisfaction. Dalton further testified that he did not interpret Lanoux's grievance to be a claim that his separation of employment from Pete Gould was alleged to be a violation of the 50/50 rule.

In reviewing the grievance and the supporting documentation that Lanoux had submitted, Dalton noticed that while Pete Gould has submitted a letter to the Respondent saying that Lanoux could not properly operate an excavator, the termination slip that Lanoux was given by

Pete Gould merely indicated that he was terminated because his assignment was complete. In addition, Lanoux's supporting documentation included a statement from a Pete Gould supervisor, Jamie Goodman, dated July 2014, indicating that Lanoux displayed knowledge and competence as a journeyman operating engineer. Dalton also noted that Lanoux has submitted statements from other employers indicating that he had integrity and was competent.

Because of the conflicting information he had received, Dalton assigned Morgan to go to the Pete Gould jobsite and investigate Lanoux's grievance. Morgan obtained a signed statement from Goodman dated August 12, 2014. Goodman's statement indicated that he was the Tie-in foremen on the hill crew and recited in some detail the problems that Lanoux had in performing his work for Pete Gould (R. Exh. 8). Morgan also obtain a second signed statement from Goodman dated August 12, 2014, indicating that Goodman signed the July 2014 letter reflecting positively on Lanoux because he felt sorry for him. In the second statement Goodman gave Morgan, Goodman claimed that he did not read the letter Lanoux presented to him and that he signed it the day after Lanoux was terminated. Morgan submitted both of Goodman's statements to Dalton.

Dalton testified that, given the conflicting information revealed by the investigation of the grievance, he decided to give Lanoux the benefit of doubt and allow the excavator classification to remain on his registration card. On August 12, 2014, Dalton sent a letter to Lanoux indicating that the Respondent determined that his grievance had merit. The letter specifically indicated: "Due to the conflicting facts and statements we are giving you the benefit of the doubt and the excavator will remain on your work out-of-work registration card. The Respondent informed Pete Gould of its decision regarding Lanoux's grievance. On August 26, 2014, Pete Gould sent a letter indicating that it was retracting its request that Lanoux not be dispatched to any Pete Gould jobsite.

Contentions of the Parties

The General Counsel contends that a union breaches its duty of fair representation toward a unit employee when its conduct is arbitrary, discriminatory or in bad faith. *Vaca v. Sipes,* 386 U.S. 171, 190 (1967). With respect to Lanoux's request for information from the Respondent regarding Groesser's employment at the Welded jobsite, the General Counsel claims that Lanoux's grievance challenged Groesser's eligibility to be employed by Welded as a key man and further claimed that the Respondent violated its exclusive hiring hall rules if it referred Groesser when he was not on the Respondent's referral list. The General Counsel contends that Leroux's request for information was made in order to determine whether the Respondent was properly fulfilling its duty as the exclusive bargaining representative of employees referred through its exclusive hiring hall.

With regard to the information sought by Lanoux with respect to the key men hired by Pete Gould in July 2014 for the project that Lanoux worked on, the General Counsel claims it is necessary for Lanoux to obtain such information in order for him to properly police the 50/50 rule. The General Counsel further contends that it is necessary for Lanoux to obtain the letters of request that he sought an order to determine whether the Respondent is making out of order referrals in a proper manner.

The Respondent contends that it did not act arbitrarily in failing to provide the information that the General Counsel contends it is obligated to provide to Lanoux. In this connection, the Respondent contends that Lanoux's information requests were unreasonable and unmanageable in terms of both form and substance. The Respondent also contends that the information requested is not reasonably related to the operation of the Respondent's hiring hall nor would it assist Lanoux in ascertaining his rights regarding hiring hall referrals. Finally, the Respondent contends that this case involves another attempt by Lanoux to obtain confidential information regarding key men that the Board found that he was not entitled to in *International Union of Operating Engineers Local 18 (Precision Pipeline)*, 362 NLRB No. 176 (2015).

Welded contends that the Respondent should not be ordered to provide information regarding Welded's key men to Lanoux because such information is confidential and proprietary and subjects Welded and the Respondent to competitive harm. In this connection, Welded argues that the Board's decision in *International Union of Operating Engineers Local 18 (Precision Pipeline)*, supra, held that the Respondent had substantial and rational reasons for not disclosing information regarding key men to Lanoux and another one of the Respondent's members because the disclosure of such information could subject signatory employers to a competitive disadvantage and thus harm the Respondent as well.

Analysis

In *Miranda Fuel Co*., 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963), the Board adopted the duty of fair representation as it had been developed by the Federal courts and held that a union breaches its duty of fair representation and commits an unfair labor practice under Section 8(b)(1)(A) of the Act when it takes action against an employee based on considerations which are "irrelevant, invidious or unfair." In *Vaca v. Sipes*, supra, the Supreme Court held that "[a] breach of the duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." [Id., at 190.]

In the instant case, the General Counsel claims that the Respondent's actions were arbitrary. There is no allegation, nor evidence, that the Respondent's refusal to provide the requested information to Lanoux was motivated by bad faith or unlawful discrimination. In its recent decision in *International Union of Operating Engineers Local 18 (Precision Pipeline)*, supra, slip op. pp. 7-8, the Board indicated the following with regard to whether a union's actions may be found to be arbitrary:

> A union's actions are considered arbitrary only if the union has acted 'so far outside a wide range of reasonableness' as to be irrational. (Citations omitted.) In serving unit employees a union must be allowed "a wide range of reasonableness" and any subsequent examination of a union's performance must be "highly deferential." (Citations omitted.)

In *Operating Engineers Local 324 (Michigan Chapter, Associated General Contractors),* 226 NLRB 587 (1976), the Board found that a union's duty of fair representation includes an "obligation to deal fairly with an employee's request for information as to his relative position on the out-of-work register for purposes of job referral through an exclusive hiring hall." In

Operating Engineers Local 513 (Various Employers), 308 NLRB 1300, 1303 (1992), which involved a request for referral information for a 6-month period from a union operating an exclusive hiring hall, the Board noted that "absent some substantial reason for refusing disclosure, a union is bound to comply with requests for referral data when they may serve some useful purpose related to fair treatment." In *Letter Carriers Branch 47 (Postal Service)*, 332 NLRB 667, 668 (2000), the Board specifically noted, that a union has an obligation to supply information when the request is "reasonably directed" toward ascertaining whether the employee has been fairly treated in receiving work assignments.

In *International Union of Operating Engineers Local 18 (Precision Pipeline),* supra, the Board found that the Respondent did not violate Section 8(b)(1)(A) of the act by refusing to provide Lanoux and another member of the Respondent, Wiltsie, copies of pre-job conference reports. These reports include specifics about a job that a signatory contractor under the NPA would be performing, including the quantity and types of equipment, the number of employees and the key men the contractor would be using on the job. In finding that the Respondent's policy of not disclosing such information to requesting employees was not unlawful, the Board noted that the Respondent's refusal to provide information to a requesting employee must be evaluated in terms of the importance of the employee's interest in the requested information. While Wiltsie had a grievance concerning his termination for work performance, the General Counsel was unable to establish what the pre-job conference report would add to the consideration of the grievance. Lanoux had no dispute with the employer and sought the pre-job conference report on the basis that if it concerned a job, he should be able to see it. The Respondent indicated that it refused to provide the pre-job conference reports because of its concern that if it disclosed such reports to any of its members who asked for it, the information contained in such reports, if disclosed to other employers, would allow unionized contractors to underbid each other and also allow nonunion contractors to utilize such information in underbidding union contractors. The Board found that the Respondent's policy concerns regarding the refusal to provide pre-job conference reports to Lanoux and Wiltsie were rational and not arbitrary and were unchallenged by any legitimate need for the reports by the employees. Id., slip op. at 9.

In *Carpenters Local 102 (Millwright Employer's Assn.)*, 317 NLRB 1099, 1108 (1995), the Board indicated that the basis for an applicant in a hiring hall to have access to the union's referral records is to determine his or her relative position in order to ascertain whether the employee has been fairly treated with regard to obtaining referrals. The Board further held, however, that there is no duty on a union's part to provide information available in the hiring hall to an applicant for employment for purposes unrelated to the fair operation of the referral system.

Whether the Respondent had an Obligation to Provide the Requested Information Regarding a Key Man at the Welded Jobsite

As noted above, on July 30, 2014, Lanoux filed a grievance claiming that Welded's hiring of Groesser, a member of another local, violated the Respondent's referral provisions. Lanoux's grievance claims that Groesser was not a key employee of Welded and that he had not worked for it since 2009, which did not give him recall rights. Lanoux claimed that because of his pipeline training he should receive preferential "dispatch" to pipeline jobs over members from other IUOE locals and further claimed he should receive back pay and fringe benefits from

June 18 through July 28, 2014, because the Respondent violated his rights to recall and its dispatch procedures.

After reviewing the grievance, Dalton assigned Business Agent Morgan to investigate it. Dalton received a report from Morgan that Groesser was hired as a key man and at the time he was hired Welded was two or three employees below the 50/50 rule and thus Welded was within its contractual rights to hire Groesser as a key man.

On August 6, Dalton denied Lanoux's grievance, noting that at the time of Groesser's hiring date,[6] less than 50 percent of Welded's employees were "regular employees" and that article II, paragraph (I) of the NPLA permits signatory employees to employ up to 50 percent of the employees as regular employees. Dalton's letter further indicated that, since the "regular" operating engineer complement of employees was less than 50 percent and Groesser fit the definition of a regular employee, Welded was in full compliance with the NPLA.

With respect to Lanoux's claim that he should have been recalled to the job by Welded, Dalton also noted that while, under the referral provisions of the HHA, Lanoux was eligible for recall because he had worked for Welded within the past 24 months, Welded had no obligation to recall him since the HHA provides that the recall of an employee is optional and not mandatory.

In Lanoux's September 2 letter, which he submitted to the Respondent on September 3, Lanoux claimed that Dalton's statement that Groesser's starting date with Welded was July 28, 2014, was an error and that he established that Groesser's hiring date was July 16, 2014. In order to correct the error, Lanoux then requested the following information from the Respondent regarding Groesser: certified payroll documents, signed dues-checkoff card; steward's report; business agent's report; date of urinalysis for Welded pre-employment test; and verification of Welded's contribution to the health and welfare, pension, apprenticeship, safety and education, pipeline training, LMCT and EPEC funds.

The General Counsel concedes that the documents Lanoux requested from the Respondent regarding Groesser are not hiring hall records per se but contends that they are reasonably related to determining whether Lanoux received fair treatment regarding the referral process. Thus, the General Counsel claims that the Respondent had an obligation to provide them to Lanoux.

I do not agree with the General Counsel's argument and find that the Respondent was not obligated to provide the information Lanoux requested from the Respondent regarding Groesser at the Welded jobsite in Noble County, Ohio. The Respondent's investigation of the grievance that Lanoux filed revealed that Groesser was hired by Welded as a key man and was not referred to Welded through the Respondent's exclusive hiring hall. The provisions of the NPA gave Welded the right to hire 50 percent of the employees at its Noble County, Ohio jobsite as key men and that, at the time that Groesser was hired, it was reported to Dalton that Welded's key men were below the 50-percent level.

[6] As noted above, in his letter Dalton incorrectly referred to Groesser's hire date as July 28, 2014, rather than July 18, 2014.

Dalton's determined that, based on the language of the NPA and the HHA and the information obtained during the Respondent's investigation of Lanoux's grievance, there was no basis to contest Welded's right to hire Groesser and he so informed Lanoux in the Respondent's August 6 letter. That decision appears to be rational and not at all arbitrary. While Dalton's August 6 letter incorrectly referred to the date of Groesser's hire as July 28, 2014, I do not see how the information that Lanoux requested from the Respondent, which he claimed would accurately establish Groesser's hiring date, would reasonably assist him in pursuing his grievance that the hiring of Groesser violated Lanoux referral rights regarding the Welded jobsite.

The Respondent's investigation revealed that at the time Groesser was hired by Welded, he was not referred through the Respondent's exclusive hiring hall, but rather Welded hired him as a key man and, at that time, it was under the 50-percent limitation of employees it was permitted to directly hire as key men. Thus, the Respondent's investigation did not reveal evidence to establish that Groesser's hire as a key man violated any contractual provisions. In denying Lanoux's grievance, the Respondent also relied on the fact that that under the HHA, while Lanoux was eligible to be recalled by Welded, such a recall is optional and not mandatory. Finally, the General Counsel does not contend, and there is no evidence to indicate, that the fact that Lanoux was not referred to the Welded jobsite in Noble County, Ohio through the Respondent's exclusive hiring hall was improper under the Respondent's rules. Thus, more accurately identifying the actual date of Groesser's hire would not reasonably assist Lanoux in the claim made in his grievance, i.e. that the Respondent was obligated to refer him to Welded, or that Welded was obligated to recall him, and that Welded was obligated to offer him a job before it hired Groesser.

Under the circumstances in this case, since information regarding Groesser's specific hire date would not reasonably assist in determining whether Lanoux was treated fairly in his efforts to become employed on the Welded pipeline job in Noble County, Ohio, I find that the General Counsel has not established that Lanoux had a legitimate need for the documents that he requested from the Respondent regarding Groesser's hire date. Accordingly, I find that the Respondent did not act arbitrarily in violation of its duty of fair representation by failing to provide the requested information. *International Union of Operating Engineers, Local 18 (Precision Pipeline), supra; Carpenters Local 102 (Millwright Employer's Assn.),* supra.

I further note that the evidence establishes that a substantial amount of the documents requested by Lanoux regarding Groesser are not in the possession of the Respondent. In this regard, the only documents that the Respondent would possess that would assist in determining Groesser's actual hire date would be a dues-checkoff card, a steward's report, and an EPEC checkoff form. While the General Counsel concedes that the evidence establishes the remaining documents would not aid Lanoux in determining Groesser's hire date, the General Counsel contends that the Respondent had an obligation to inform Lanoux that it did not possess such documents. Since I find that the Respondent did not have an obligation to provide any of the documents that Lanoux requested for the reasons expressed above, I also find that the Respondent had no obligation to inform him of the requested documents that it did not possess.

I find the cases relied on by the General Counsel in support of this complaint allegation to be distinguishable. In *Boilermakers Local 197 (Northeastern State Boilermakers Employers),*

318 NLRB 205 (1995), the evidence established that a union member had a reasonable belief that there been a violation of the respondent's hiring hall referral procedures and the respondent denied the member's request for photocopies of the hiring hall's referral records. Since the union member had a reasonable belief that he been treated unfairly by the respondent's hiring hall and the respondent could not show its refusal to provide the records was necessary to vindicate legitimate union interests, the Board found the respondent's conduct to be arbitrary and thus a breach of its duty of fair representation in violation of Section 8(b)(1)(A). Similarly, in *Carpenters Local 35 (Construction Employers Assn.),* 317 NLRB 18 (1995), the Board found that a union member reasonably believed that he had been discriminatorily denied referrals from the respondent's exclusive hiring and thus had a right to copies of the hiring hall records that he had requested.

As I have noted above, the documents that Lanoux sought from the Respondent regarding Groesser's hire date on the Welded jobsite in Noble County, Ohio, in July 2014 are not hiring hall referral records and have no reasonable bearing on the issue of Lanoux not being referred through the Respondent's hiring hall to that particular Welded jobsite.

In support of this complaint allegation, the General Counsel also relies on a statement in *Operating Engineers Local 513 (Various Employers),* 308 NLRB 1300, 1303 (1992), that "[I]t is enough to establish a right to hiring hall information that the applicant simply wishes to see it" Accord: *Carpenters Local 35 (Construction Employers Association),* supra, at 23. I find the above noted statement be insufficient to establish a violation of the duty of fair representation owed by the Respondent to Lanoux in the instant case. In the two cases referred to above, the charging parties were applicants for employment through an exclusive hiring hall and sought to obtain, for a 6-month period, records reflecting the referrals through the hiring hall, including the names, addresses and telephone numbers of all individuals who asked that their names be placed on the referral list, the dates of such request, the dates of each referral of each such person to a job, including the name of the employer and the identification of the jobsite, and the date of any subsequent layoff or discharge of the employee. As I have noted previously, the records that Lanoux sought from the Respondent regarding the hiring date of Groesser are not records that are kept in the normal operation of the hiring hall since Groesser was not referred through the hiring hall. In addition, I find that the statement by the Board noted above in *Operating Engineers Local 13*, supra, also must be read in conjunction with another section of that decision in order to consider it in context. In *Operating Engineers Local 513,* supra*,* the Board stated:

> An applicant ought to be entitled, as matter of right, to inspect hiring hall records to determine whether his employment opportunities have been, inadvertently or otherwise, interfered with. This information is not, and should not be, secret, and should be subject to the unrestrained scrutiny of those persons most vitally interested in it without the would be workers having to make a showing of "reasonable belief" that he or she is the object of hostile treatment.[Id., at 1303.]

As noted above, the documents that Lanoux sought from the Respondent regarding Groesser's hire date are not kept in the normal course of operations in the Respondent's hiring hall. Therefore, I believe it was it was incumbent upon the General Counsel to establish that those documents were reasonably related to Lanoux being able to establish unfair treatment in

the operation of the exclusive referral system before the Respondent was obligated to provide them to him. In my view, such a relationship has not been established.

It is clear that in *Operating Engineers Local 513*, supra, the Board's statement that an employee applicant has a right to see hiring hall information was in reference to the actual records involving the operation of an exclusive referral system. In the instant case, the actual hiring hall referral records are posted by the Respondent in in the district office from which the referral was made. There are five district offices located throughout the State of Ohio and the posted referral records are available for inspection by Lanoux or any other applicant for employment in each of those offices. Thus, the Respondent is in compliance with the Board's requirement that the actual records involving the operation of an exclusive hiring hall should be available for inspection by applicants for employment.

After considering all of the foregoing, I conclude that the Respondent has not violated its duty of fair representation by failing to provide Lanoux with the information contained in his September 2, 2014 letter requesting information regarding Groesser's hire date on the Welded jobsite in Noble County, Ohio. Accordingly, I find that the Respondent's conduct has not violated Section 8(B)(1)(A) of the Act and I shall dismiss that allegation in the complaint.

Whether the Respondent had an Obligation to Provide the Requested Information Regarding Key Men at the Pete Gould Jobsite

As noted above, in late July 2014, Lanoux was referred from the Respondent's hiring hall to operate an excavator for Pete Gould on a pipeline project in Monroe County, Ohio. After 2 days, Lanoux was laid off and was informed by his supervisor merely that his assignment was completed.

On July 29, 2014, the Respondent's district office in Akron, Ohio, received a letter from a Pete Gould superintendent requesting that Lanoux no longer be dispatched to any jobs at Pete Gould because he had operated an excavator in an unsatisfactory and unsafe manner. Pursuant to the Respondent's established practice, the Respondent forwarded to Lanoux the letter it received from Pete Gould and informed him that excavator would be removed from his registration card. The letter further informed him the manner in which he could reinstate excavator to his referral card.

On August 11, 2014, Lanoux filed a grievance with the Respondent contesting the removal of excavator from his referral card and seeking as a remedy that excavator be restored to his referral card or, in the alternative, that the Respondent acknowledge the inadequacy of the pipeline training provided by the Respondent and the International Union. In his grievance, Lanoux sought a substantial amount of information including, inter alia, the following information regarding the Pete Gould project in Monroe County, Ohio: the names, dates of employment, and position of regular employees, and any requests Pete Gould made to the Respondent for the referral of specific operators. Lanoux's grievance did not indicate why the requested information was necessary and relevant to the grievance that he filed.

As noted above, the Respondent found merit to Lanoux's grievance and granted him his requested remedy of restoring excavator on his out of work registration card. The Respondent

also obtained a letter from Pete Gould indicating that it was retracting its request that Lanoux not be dispatched to any Pete Gould jobsite. Thus, Lanoux obtained a substantial remedy pursuant to his grievance.

The information sought by Lanoux in his August 11, 2014 grievance regarding the names of regular employees (key men), the dates of employment and the position they held with Pete Gould are not records that the Respondent keeps in the normal operation of its exclusive hiring hall. As discussed previously, the NPA gives a signatory employer such as Pete Gould an absolute right to directly hire up to 50 percent of its work force on a pipeline project without utilizing the Respondent's hiring hall. Although the record is not specific as to what information the Respondent possesses with respect to the key man that Pete Gould employed on the Monroe County Ohio project, the record does establish that generally information regarding key men is contained in pre-job conference reports. In addition, weekly steward reports contain information regarding who is working on a jobsite and the Respondent utilizes such information in monitoring the 50/50 rule.

As noted above, Lanoux gave no explanation in his August 11 request as to why it was necessary for him to have the information he sought regarding Pete Gould's key employees. At the hearing, however, Lanoux testified that he requested such information in order to police the 50/50 rule, without giving any further explanation as to why he felt was necessary for him to do so on this jobsite.

As I discussed earlier, the Board has previously considered attempts by Lanoux and another employee applicant, Wiltsie, to obtain from the Respondent pre-job conference reports which include information regarding an employer's key men. *International Union of Operating Engineers Local 18 (Precision Pipeline)*, supra. The Board found that the Respondent's refusal to provide the pre-job conference reports must be evaluated in terms of the importance of the employees' interest in obtaining them and found that the employees' interests were "unidentifiable except as an abstract demand to be entitled to any document that might list or mention a term or condition of employment." Id., slip op at 9.

In the instant case, I find that the importance of Lanoux's interest in obtaining information regarding the key men hired by Pete Gould on the Monroe County, Ohio pipeline project, so that he could assertedly police the application of the 50/50 rule, is fairly insubstantial. Lanoux's grievance did not involve an alleged violation of the 50/50 rule as playing any role in his termination and there is no evidence to suggest that Pete Gould did not comply with the NPA regarding the application of the 50/50 rule on the Monroe County, Ohio jobsite.

In *International Union of Operating Engineers Local 18 (Precision Pipeline*), supra, the Board found that the Respondent had a legitimate concern that, if it were to disclose pre-job conference reports to members on request, these reports could be relayed to other employers signatory to the NPA and allow them to outbid each other based on the detailed information contained in such reports. The Board also noted that this concern was exacerbated by the prospect that the information contained in pre-job conference reports could be obtained by nonunion contractors and could be used to underbid unionized employers. The Board determined that the interest of the Respondent in protecting the competitiveness of unionized contractors

was a legitimate institutional interest and established that the Respondent's position in refusing to provide pre-job conference reports to members was not arbitrary. Id., slip op. at 8.

As I have noted previously, information containing the names and the classifications of key men are often contained in pre-job conference reports. In the instant case, the credited testimony of Mack Bennett, the pipeline director of the International Union, and Donald Thorn, the president of Welded and a member of the PLCA's board of directors, establishes that because the pipeline construction business is very competitive, information regarding an employer's key men on a jobsite, if disclosed, could be used by a competitor to its advantage in the bidding process. In this connection, Bennett testified that if a competitor employer could obtain another employer's list of key men for a project, the competitor could determine how many crews the employer was going to use and the type of equipment and utilize that information in preparing its own bids.

Bennett also testified that because the pipeline construction industry requires specialized skills, it is critical for an employer to have key men constitute up to half of its work force because these employees' skills are known to the employer. The employer does not know if the employees referred from a hiring hall will have the same skill level. Both Thorn and Bennett testified that because skilled key man are critical to a pipeline construction project, a practice exists in the industry of an employer attempting to hire the key men of another employer, which is commonly referred to as "pirating" The loss of key men to another employer could have a substantial impact on the cost of a project and thus the profitability of an employer.

I find that the Respondent's refusal to provide Lanoux with the information he requested regarding the key men employed on the Pete Gould project is supported by the same concerns that the Board found persuasive in *International Union of Operating Engineers Local 18 (Precision Pipeline)*, supra. In this regard, the Respondent has a legitimate concern that the disclosure of information regarding a signatory employer's key men for a particular job site, on request, to employee applicants through the hiring hall, such as Lanoux, could result in harm to the employer whose information was disclosed. In this regard, the disclosure of an employer's key men on a project could result in competitors possibly "pirating" the key men of the employer and assist competitors in underbidding the employer in future projects. The Respondent has a legitimate institutional interest in assisting and maintaining the competitiveness of signatory employers so that they may continue to employ employees represented by the Respondent.

Weighing the Respondent's legitimate institutional interests in refusing to provide to Lanoux the information he sought regarding the key men employed by the Pete Gould project in Monroe County, Ohio, against the relatively insubstantial interest I find that Lanoux has in obtaining such information, I conclude that Respondent's position is within the wide range of reasonableness accorded to a union in such matters and thus it was rational and not arbitrary. Accordingly, I find that the Respondent's conduct did not violate Section 8(b)(1)(A) of the Act and I shall dismiss that allegation in the complaint.

There remains one complaint allegation for resolution. As noted above, in Lanoux's August 11, 2014 grievance against Pete Gould, he sought any requests that Pete Gould made to the Respondent for the referral of specific operators on the Monroe County, Ohio project. The

complaint alleges that the Respondent's refusal to provide such information to Lanoux violated Section 8(b)(1)(A) of the Act.

As noted above, such records are referred to as letters of request. The General Counsel correctly notes that letters of request are utilized in the normal operation of the Respondent's hiring hall. Article III of the Respondent's HHA with the Ohio's Contractor Association provides that a signatory employer may request that the Respondent refer a named operating engineer who is registered on the hiring hall referral list. Dalton testified that signatory employers under the NPA are also permitted to submit letters of request to the Respondent and that operating engineers referred to an employer pursuant to a letter of request are counted toward the Respondent's 50 percent share of the work force on jobs covered by the NPA.

After receiving a letter of request from an employer, the Respondent's practice is that its dispatcher confirms that the requested operating engineer has been on the hiring hall referral list for at least 10 days. If an operating engineer is referred pursuant to a letter of request, on the weekly posting of all referrals made from the hiring hall, the dispatcher checks a box indicating that the operator was referred pursuant to a letter of request. The letters of request themselves are not posted in the hiring hall.

The normal rule in the Respondent's hiring hall is that the employee with the necessary skills who is been on referral list the longest is the first to be referred. The General Counsel contends that since letters of request establish a basis for the Respondent to refer an operating engineer in divergence from the normal rule, Lanoux's request to obtain any letters of request that Pete Gould may have made with regard to the Monroe County, Ohio jobsite involves the question of fair treatment, as the nonexistence of a letter of referral may establish a violation of the hiring hall referral rules.

As explained above, in the normal course of the Respondent's operation of its hiring hall, if any referrals were made pursuant to a letter of request made by Pete Gould regarding its project in Monroe County, Ohio, such information would have been posted at the Respondent's district office with jurisdiction over the jobsite. While the actual letter of referral would not be posted, the posted hiring hall records would clearly reflect the names of operating engineers referred by that mechanism. This information is, of course, readily available to Lanoux and any other employee applicant utilizing the Respondent's exclusive hiring hall.

The grievance that Lanoux filed regarding his removal from the Pete Gould job did not allege that it was, in any way, related to an alleged violation of the Respondent's referral rules as they apply to letters of request. Lanoux's grievance did not indicate any reason for his request for such information and he testified at the hearing only that he wanted the information he sought from the Respondent regarding the Pete Gould project was in order to police the 50/50 rule. Lanoux offered no testimony to establish how the presence or absence of letters of request would assist in in any meaningful way in that regard or why it was necessary for him to police the 50/50 rule on that project.

Under the circumstances present in this case, I find that the Respondent did not act arbitrarily in failing to provide Lanoux with any letters of request that Pete Gould may have submitted to the Respondent regarding its jobsite in Monroe County, Ohio, when the existence of

any such letters of request can be easily determined by reviewing the Respondent's posted information in the district office with jurisdiction over that jobsite. I find the Respondent's conduct with respect to this issue to be within the wide range of reasonableness accorded to it in determining whether it has fulfilled its duty of fair representation. *International Union of Operating Engineers Local 18 (Precision Pipeline)* supra, slip op. at pps. 7-8 Accordingly, I shall also dismiss this allegation in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., January 22, 2016

Mark Carissimi
Administrative Law Judge

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.